

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEONARD LEPPEL JACKSON,

Defendant-Appellant.

UNPUBLISHED

March 26, 2009

No. 281380

Wayne Circuit Court

LC No. 07-010097

Before: Jansen, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of armed robbery, MCL 750.529, and two counts of felonious assault, MCL 750.82. He was sentenced as a third-offense habitual offender, MCL 769.11, to concurrent prison terms of nine to 20 years for the armed robbery conviction and two to eight years for each felonious assault conviction. He appeals as of right. We affirm in part, vacate in part, and remand for reconsideration of the order requiring defendant to pay attorney fees.

At approximately 9:00 p.m. on January 12, 2007, Sherry Taylor exited Cheers Party Store in Detroit with her two young children. As she was putting her children in her car, she noticed a man later identified as defendant running toward her. According to Taylor, defendant approached her, pointed a gun at her children, and said, “B---h, give me all your money or I’m a [sic] shoot your kids.” Taylor gave defendant \$120 along with some other items. Defendant then ran away. He was apprehended in May 2007, after Taylor recognized him on a bicycle in front of a different store and called the police.

Defendant first argues that the evidence was insufficient to support his felonious assault convictions because the prosecutor failed to prove that he possessed a dangerous weapon. In light of the trial court’s factual findings, we agree. When determining whether sufficient evidence existed to support a bench trial conviction, we view the evidence in the light most favorable to the prosecution and determine whether the trial court could have concluded that the prosecutor proved the essential elements of the offense beyond a reasonable doubt. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). Further, in reviewing a verdict reached in a bench trial, we review the trial court’s factual findings for clear error and its conclusions of law de novo. See *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006).

“The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007) (internal citation and quotation marks omitted). Here, defendant contests the “dangerous weapon” element. MCL 750.82 proscribes the use of “a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon” The trial court specifically determined that the prosecutor failed to prove beyond a reasonable doubt that defendant possessed a gun during the armed robbery. The trial court opined that although Taylor and her daughter, Cherrise Harris, described the object as a silver or nickel-plated handgun, no handgun was recovered, and it would not speculate whether the object that defendant possessed was indeed a handgun. Moreover, the evidence did not show, and the trial court did not find, that the object possessed was a dangerous weapon other than a handgun. Therefore, viewed in light of the trial court’s factual findings, the evidence was insufficient to establish that defendant assaulted the children with a dangerous weapon.

The trial court acquitted defendant of being a felon in possession of a firearm, MCL 750.224f, and possessing a firearm during the commission of a felony, MCL 750.227b, but convicted him of armed robbery and felonious assault. In *People v Williams*, 99 Mich App 463, 464; 297 NW2d 702 (1980), this Court held that the trial court’s verdicts convicting the defendant of felonious assault but acquitting him of felony-firearm were inconsistent because “[t]he only weapon which could support a conviction of felonious assault was the same weapon which would lead to a finding of guilt under the felony-firearm charge.” In the present case, the trial court also committed an error, by determining that a gun or other dangerous weapon was not necessary to convict defendant of felonious assault. The trial court stated:

[I]t would be speculation for me to venture into whether or not this was, in fact, a firearm as required by the [felony-firearm and felon-in-possession] statute[s]. I mean I have a description of it being a handgun, I have – but I don’t know whether it was a handgun or not. No handgun was ever recovered in this particular case.

But for purposes of the Armed Robbery and Felonious Assaults, it doesn’t necessarily require that it be an actual handgun. It – for the Armed Robbery count, they can possess an object which is used or fashioned in a manner to lead the person who is present to reasonably believe that it was a dangerous weapon or to represent orally or otherwise that he was in possession of a weapon. I don’t know whether or not that was a handgun or not. And because of the lack of evidence – it’s sufficient to create in the mind of [the child victims] that they thought it was a handgun, that they were afraid because they – it was represented that it was a handgun.

The trial court legally erred by determining that felonious assault does not require an actual gun or other dangerous weapon. As recognized in *Chambers*, *supra* at 9, although armed robbery can be committed

without the actual use of a dangerous weapon, such as where a defendant uses an article fashioned in a manner to lead a person to reasonably believe that the article is a dangerous weapon, or where the defendant merely represents orally or

otherwise that he or she is in possession of a dangerous weapon[,] . . . [f]elonious assault . . . requires the use of a dangerous weapon.”

Therefore, the trial court convicted defendant of felonious assault based on its erroneous determination regarding the elements of the offense.

Further, the prosecutor’s reliance on *People v Ware*, 97 Mich App 728; 296 NW2d 164 (1980), is misplaced. In that case, this Court concluded that a jury’s verdicts acquitting the defendant of felony-firearm and convicting him of felonious assault were not inconsistent because the jury could have found that the gun was not operable and thus was not capable of propelling a dangerous projectile in accordance with the statutory definition of “firearm.” *Id.* at 730-731. In that case, however, unlike in the instant case, there was no dispute that the defendant possessed a gun.¹

Because the trial court determined that the evidence failed to establish that defendant possessed a gun or other dangerous weapon, we must conclude that the evidence failed to factually support defendant’s felonious assault convictions. Accordingly, we vacate those convictions.

Defendant next argues that the identification evidence presented during trial was insufficient to support his convictions. Specifically, defendant contends that the testimony of Taylor and Harris identifying him as the perpetrator was inadequate to support the verdict. We disagree.

Taylor identified defendant as the perpetrator during trial, and, upon the trial court’s inquiry, testified that she was sure that the man who robbed her was defendant. She was only a few feet away from the perpetrator during the robbery and looked into his eyes. A floodlight on top of the store illuminated the area. When shown a series of photographs after the incident, she did not identify any of the men depicted in the photos as the perpetrator, but defendant’s photo was not included. Taylor maintained that she had no doubt in her mind and was positive that defendant was the perpetrator. Although her estimate of the perpetrator’s weight did not accord with that of defendant, she admitted that she is not good at guessing a person’s weight. In addition, Harris testified that she looked at the perpetrator’s face during the incident and was able to see his face because the overhead light in the car illuminated when defendant opened the car door. She was approximately two feet from defendant during the incident. After initially testifying that she did not know whether she could identify the perpetrator, she identified defendant because she recognized his face. Viewed in the light most favorable to the prosecution, the evidence was sufficient to establish that defendant committed the armed robbery. *Wilkens, supra* at 738.

¹ We also note that this case is unlike *People v Ellis*, 468 Mich 25, 26-27; 658 NW2d 142 (2003), in which the trial court convicted the defendant of carjacking and felonious assault, but acquitted him of felon-in-possession and felony-firearm. Unlike the situation in the instant case, the trial court in *Ellis* specifically determined that the defendant possessed a gun during the offenses. *Id.* at 27. Thus, the Supreme Court concluded that the trial court’s verdicts could not be “rationally reconciled.” *Id.*

Defendant next challenges the scoring of prior record variable 7 (PRV 7) and offense variables (OVs) 1 and 2 of the sentencing guidelines. Although we conclude that these variables were improperly scored, as discussed below, we must affirm defendant's sentence because it "is within the appropriate guidelines sentence range" and defendant failed to raise this issue "at sentencing, in a proper motion for resentencing, or in a proper motion to remand" filed with this Court. MCL 769.34(10).

MCL 777.57(1)(a) provides that a sentencing court is to score 20 points for PRV 7 if "[t]he offender has 2 or more subsequent or concurrent convictions[.]" The trial court assessed 20 points for PRV 7 based on defendant's concurrent felonious assault convictions. Because the trial court's findings were insufficient to support these convictions, PRV 7 should have been scored at zero. Under MCL 777.57(1)(c), a sentencing court should score zero points if "[t]he offender has no subsequent or concurrent convictions." Accordingly, because the trial court's findings supported only defendant's armed robbery conviction, he should have been assessed zero points for PRV 7.

In addition, defendant was scored 15 points under OV 1 for "aggravated use of a weapon." MCL 777.31(1). MCL 777.31(1)(c) allows a trial court to score 15 points under OV 1 if "[a] firearm was pointed at or toward a victim[.]" Based on the trial court's finding that the evidence did not establish that defendant possessed a firearm, the trial court's assessment of 15 points under OV 1 was erroneous. MCL 777.31(2)(c) states, "[s]core 5 points if an offender used an object to suggest the presence of a weapon." In addition, MCL 777.31(1)(e) directs a trial court to score five points if "[a] weapon was displayed or implied[.]" The trial court determined that, although the object was not necessarily a gun, defendant used the object in a manner to lead the victims to believe that it was a gun. Therefore, the trial court should have scored five points for OV 1. The prosecutor's argument that OV 1 should have been scored at ten points lacks merit. MCL 777.31(1)(d) states that ten points should be scored under OV 1 if "[t]he victim was touched by any other type of weapon[.]" Here, there was no evidence that any of the victims were touched by a weapon. Rather, the evidence showed that defendant pointed the object at the children. Thus, five points were properly assessable under OV 1.

Defendant also challenges the scoring of OV 2 regarding the "lethal potential of the weapon possessed or used." MCL 777.32(1). The trial court scored five points under OV 2 for the possession or use of "a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon[.]" MCL 777.32(1)(d). This scoring for OV 2 was erroneous considering the trial court's determination that there was insufficient evidence of a firearm. Although the prosecutor argues that defendant should have been scored one point under OV 2, the trial court's decision does not support this argument. MCL 777.32(1)(e) provides that one point should be scored for OV 2 if "[t]he offender possessed or used any other potentially lethal weapon[.]" The trial court determined that the object that defendant possessed was not necessarily a handgun, but that it was an object used or fashioned to lead the victims to believe that it was a gun. The trial court did not indicate what the object was, and it appears from the record that the trial court did not know what the object was if it was not a gun. Therefore, based on the trial court's findings, there is no indication that defendant possessed a "potentially lethal weapon." Accordingly, defendant

should have been scored zero points under OV 2 for “possess[ing] or us[ing] no weapon[.]”² MCL 777.32(1)(f).

The trial court sentenced defendant to nine to 20 years’ imprisonment based on sentencing guidelines that provided for a minimum sentence range of nine to 22-½ years, or 108 to 270 months. If defendant’s sentencing guidelines are corrected as provided in this opinion, his minimum sentence range would be 51 to 127-½ months as adjusted for defendant’s third-offense habitual offender enhancement. See MCL 777.21; MCL 777.62. Because defendant’s armed robbery sentence is within the appropriate guidelines range and defendant did not raise this issue “at sentencing, in a proper motion for resentencing, or in a proper motion to remand,” we must affirm defendant’s sentence under MCL 769.34(10). *People v Francisco*, 474 Mich 82, 88-89; 711 NW2d 44 (2006); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

Defendant next argues that the trial court erred by ordering him to pay attorney fees in the amount of \$1,070 without considering his ability to pay. Because defendant failed to preserve this issue for appellate review by objecting below, our review is limited to plain error affecting defendant’s substantial rights. *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004).

In ordering a defendant to pay attorney fees for his court-appointed attorney, a trial court must, at a minimum, indicate that it has considered the defendant’s ability to pay. *Id.* at 254-255. Here, the trial court made no mention of defendant’s ability to pay, but merely stated on the record that defendant owed \$1,070 in attorney fees for his trial. As in *Dunbar*, *supra* at 255, these comments are insufficient for us to conclude that the trial court considered defendant’s financial circumstances. This error was plain, and it clearly prejudiced defendant. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Although the prosecutor argues that this issue was raised prematurely, the trial court entered a final order for reimbursement of attorney fees on September 5, 2007, that required defendant to commence payment forthwith and provided for a 20 percent penalty on all outstanding fees not paid within 56 days of that date. Therefore, this issue was not raised prematurely. Accordingly, as in *Dunbar*, we vacate the order requiring defendant to pay \$1,070 in attorney fees and remand for reconsideration of this issue.

Further, defendant argues that attorney fees should not be included in the judgment of sentence, but instead set forth in a separate order. In *Dunbar*, *supra* at 256 n 15, this Court recognized that “Michigan currently lacks a statutory scheme which authorizes repayment of court-appointed attorney fees[.]” Therefore, this Court held that repayment of such fees “may not be imposed as part of the sentence.” *Id.* Following *Dunbar*, however, our Legislature enacted MCL 769.1k(1)(b)(iii), which authorizes the imposition of attorney fees as part of a defendant’s sentence. Accordingly, a judgment of sentence may provide for the repayment of

² Arguably, defendant possessed an object that he was using as a weapon, albeit not a potentially lethal weapon. MCL 777.32, however, does not provide for objects that may be considered weapons, but not potentially lethal weapons. Rather, the statute directs sentencing courts to score one point for potentially lethal weapons and to score zero points if no weapon was possessed or used. Thus, even if defendant possessed a weapon that was not potentially lethal, no points were assessable for OV 2 under MCL 777.32.

such fees, *People v Trapp (On Remand)*, 280 Mich App 598, 601-602; ___ NW2d ___ (2008), and defendant's argument to the contrary lacks merit.

Affirmed in part, vacated in part, and remanded for reconsideration of the order directing defendant to pay attorney fees. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood